

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

SOUTHERN BROADCASTING
& INVESTMENTS)Licensee of)
WBTY(FM), Homerville, Georgia)FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
MM Docket No. 90-214

To: Chief, Mass Media Bureau

**EMERGENCY REQUEST FOR ORDER TO
REQUIRE STATION WBTY TO CHANGE CHANNELS OR TO DELETE
CONDITION ON CONSTRUCTION PERMIT AND/OR
SPECIAL TEMPORARY AUTHORITY**

Jesup Broadcasting Corp. ("JBC"), licensee of WIFO-FM, Jesup, Georgia, respectfully requests the Chief, Mass Media Bureau, to order Southern Broadcasting & Investments ("Southern"), licensee of WBTY(FM), Homerville, Georgia, to cease broadcasting on Channel 288A and begin operation on Channel 254A as ordered in MM Docket No. 90-214. JBC holds a construction permit to upgrade WIFO-FM to Class C3 on Channel 288C3 (File No. BPH-961029IF) which expires December 21, 2000. JBC is ready, willing and able to construct WIFO-FM's new facilities, however, because of the refusal of WBTY, Homerville, Georgia, to vacate Channel 288A, WIFO-FM cannot complete construction. Therefore, JBC respectfully requests the Chief, Mass Media Bureau, to order Southern immediately to vacate Channel 288A and authorize JBC to begin operating WIFO-FM on Channel 288C3. In support whereof, the following is shown:

On April 11, 1997, JBC was issued a construction permit authorizing the upgrade of WIFO-FM to operate on Channel 288C3 rather than Channel 288A. Nine conditions appear on JBC's construction permit. Condition No. 9 provides as follows:

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“Program tests for WIFO-FM will not commence on Channel 288C3 until program tests for WBTY commence on channel 254A, and a license will not be granted for WIFO-FM on channel 288C3 until a license is granted for WBTY on Channel 254A.”

WBTY is still operating on Channel 288A. It must relocate to Channel 254A in order to clear the operation of Channel 288C3 at Jesup, Georgia. Until WBTY changes channels, WIFO-FM cannot increase power and operate on Channel 288A. In MM Docket No. 90-214, the license of WBTY was modified for operation on Channel 254A. (See Memorandum Opinion and Order, *Homerville, Lakeland and Statenville, Georgia*, 8 FCC Rcd 2953 (Policy and Rules Division, April 30, 1993) ("Change Order"). The licensee of WVGA(FM),¹ Lakeland, Georgia, agreed to reimburse the licensee of WBTY for the necessary expenses involved in the change of channels (See Change Order, *supra*, at paragraph 13). JBC is informed that this reimbursement has not been paid, and as a result, WBTY has not changed channels.

Because of the failure of WBTY to change channels, WIFO-FM has been prevented for almost three years from constructing its upgraded facilities. The permit would expire April 7, 2000, but for a recent Commission action extending permits like JBC's to December 21, 2000. The licensees of WBTY and WVGA should be ordered to immediately comply with the Commission's directive in the Change Order.

The Commission established guidelines for determining the reimbursement owed to a licensee ordered to change frequencies in *Second Report and Order in BC Docket No. 16662 (Circleville, Ohio)*, 8 FCC 2d 159 (1967) ("Circleville"). In such cases the Commission expects the parties to determine expeditiously, mutually and in good faith, reasonably and prudently incurred reimbursable expenditures. The Commission in *Circleville*, in establishing the guidelines governing the reimbursement owed by the benefiting party, considers a number of

¹ Formerly WHFE(FM).

clear and unambiguous factors. There is no reason why WBTY and WVGA cannot settle their differences so that WIFO-FM can complete construction.

The FCC in *Letter to Gary S. Smithwick, Esq. and Mark N. Lipp, Esq.*, released January 12, 1998 (copy attached) the Assistant Chief, Mass Media Bureau, ordered the licensee of KIMY(FM), Watonga, Oklahoma, to commence operations on a channel that would clear the relocation of station KTLS(FM), Newcastle, Oklahoma. The Commission gave KIMY thirty (30) days from the date of its letter in which to commence operations on the channel that would clear KTLS. The Commission furthered ordered that on the thirtieth day, regardless of whether KIMY had commenced operations on the new channel, KTLS could commence program test operations with the parameters authorized by their construction permit. This was done notwithstanding potential for interference between KTLS and KIMY. The Commission should take the same action here. Three years is too long to wait for a simple change in frequency.

JBC requests the Commission to order WBTY to cease operating on Channel 288A, and if WBTY refuses, to delete Condition No. 9 from JBC's construction permit, and to permit WIFO to initiate program tests notwithstanding WBTY's continued operation on Channel 288A. JBC requests whatever special temporary authority may be required to achieve its goal. It is not in the public interest to perpetuate the inability of WIFO to serve its expanded service area.

Accordingly, JBC respectfully requests the Commission to order the licensee of WBTY, Homerville, Georgia, to immediately cease operation on Channel 288A, to relocate to Channel

254A and permit WIFO-FM to commence program tests on 288C3 notwithstanding interference that may arise from WBTY remaining on Channel 288A.

Respectfully submitted,

JESUP BROADCASTING CORP.

A handwritten signature in black ink, appearing to read 'Gary S. Smithwick', written over a horizontal line.

By:

Gary S. Smithwick
Its Counsel

Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20046
(202) 785-2800

March 28, 2000

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NW
WASHINGTON DC 20554

MASS MEDIA BUREAU
AUDIO SERVICES DIVISION
TECHNICAL PROCESSING GROUP
APPLICATION STATUS: (202) 418-2730
HOME PAGE: www.fcc.gov/mmb/asd/

PROCESSING ENGINEER: Edward P. De La Hunt
TELEPHONE: (202) 418-2740
FACSIMILE: (202) 418-1410
MAIL STOP: 1800B3
INTERNET ADDRESS: edelahun@fcc.gov

JAN 12 1998

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, NW
Suite 510
Washington, DC 20036

Mark N. Lipp, Esq.
Ginsburg, Feldman and Bress, Chartered
1250 Connecticut Avenue N.W.
Washington, DC 20036

Re: KTLS(FM), Newcastle, Oklahoma
Tyler Broadcasting Corporation
File No. BPH-970121IA
Special Temporary Authority

KIMY(FM), Watonga, Oklahoma
Vera Dunn
MM Docket 95-175

Dear Counsel:

This is in reference to: (i) the November 6, 1997 request for Special Temporary Authority ("STA") filed on behalf of Tyler Broadcasting Corporation, licensee of FM station KTLS(FM), Newcastle, Oklahoma ("Tyler"); (ii) the October 9, 1997 Emergency Request for Order to Require Station KIMY, Watonga, Oklahoma to Change Channels or Deletion of Condition on Construction Permit and/or Special Temporary Authority ("Emergency Request") filed by Tyler; (iii) the November 10, 1997 Opposition to the Emergency Request ("Opposition") filed on behalf of Vera Dunn, licensee of station KIMY(FM), Watonga, Oklahoma ("Dunn"); and (iv) all other related pleadings.

MM Docket 95-175

Pursuant to the *Report and Order* in MM Docket No. 95-175, 11 FCC Rcd 16896 (Policy & Rules Division 1996), the Commission ordered station KIMY to change Channels from 228A to 230A. This channel change was necessary in order to accommodate Tyler's request for change in community of license and reallocation of Channel 227C1 from Ada to Newcastle, Oklahoma for station KTLS. The *Report and Order* became effective on January 17, 1997. Pursuant to Commission policy, Tyler must reimburse Dunn for the reasonable costs associated with its change of frequency of Station KIMY as governed by the *Second Report and Order* in BC Docket No. 16662 (Circleville, Ohio), 8 FCC 2d 159 (1967) ("*Circleville*").

Emergency Request

Pursuant to the *Report and Order*, on January 21, 1997, Tyler filed an application for construction (File No. BPH-970121IA) permit to implement its change in community of license. On July 8, 1997, the Commission granted the application authorizing Tyler to construct Class C1 facilities for Station KTLS, Newcastle, OK. However, due to a short spacing to Dunn's present facilities of station KIMY on Channel 228A, the construction permit contains the following special operating condition and restriction:

Program Tests for KTLS(FM) will not commence on Channel 227C1 until Program Tests for KIMY(FM) commence on Channel 230A and a License will not be granted for KTLS(FM) on Channel 227C1 until a License is granted for KIMY(FM) on Channel 230A.

The condition specifically limits the operation of Tyler's station on Channel 227C1 to cover Newcastle, Oklahoma until Dunn's station commences operation of Channel 230A. Tyler indicates that KTLS is fully constructed and is ready to go on-air. Tyler acknowledges the fact that the condition has not been satisfied. In recognition, Tyler submits the Emergency Request in which it requests that the Commission to direct Dunn to operate station KIMY(FM) on Channel 230A from its present site.¹

Tyler seeks relief so that it may begin operation with its newly constructed facilities. Tyler states that it has been unable to reach an agreement with Dunn on the channel change expenses for which Dunn is entitled to reimbursement. Tyler asserts that it has attempted to negotiate in good faith a reimbursement amount with Dunn. Tyler claims that Dunn's latest reimbursement demand of \$146,190 is extremely unreasonable. Therefore, Tyler appeals to the Commission to determine the amount of reasonable expenses for which Tyler is responsible, and to require Dunn to accept a reasonable amount to change channels and for incidental costs. In the alternative, Tyler asks the Commission to permit KTLS to initiate operating from Newcastle without regard to whether KIMY has completed the required channel change.

¹ The staff confirms that operation on Channel 230A would be acceptable at the KIMY licensed transmitter site.

Opposition

Dunn argues that Tyler's Emergency Request is unfounded. Dunn asserts that Tyler has never acted in good faith and has repeatedly failed to respond when provided estimates and requests for meetings. Dunn states that it has no intentions of delaying Tyler's move. However, Dunn argues that it simply wants Tyler to treat the station fairly and compensate reasonable expenses in accordance with the rules. Counsel for Dunn states that he is involved in several cases in which comparable stations were paid the same or higher amounts than estimated by Dunn.

Dunn strongly opposes Tyler's suggestion that the Commission should disregard the special operating condition which limits the commencement by Tyler of operations on 227C1 until Dunn commences operation on 230A because it would result in objectionable interference to the current operation of Dunn on 228A. Dunn states that such an approach would affect 1009 persons. Since KIMY's entire market is only 3800-4000 people, Dunn argues that to do so would cause interference to 25-27% of KIMY's market. Dunn states that the Commission has stated that KIMY does not need to change its channel until it receives payment.

Reply

In reply to Dunn's opposition, Tyler states that Dunn's demand for \$146,190 is unsupported by the evidence and cannot be justified under existing precedent, *i.e.*, *Circleville* and more recent precedent, *Peter Wayne Lechman*, 8 FCC Rcd 3058 (1993). Tyler states it is unwilling to pay Dunn a penny beyond actual, provable expenses associated with the channel change. Tyler takes issue with Dunn's statement that the reimbursement is comparable to other stations. Tyler argues that *Circleville*, and not amounts other stations have received, should be used to determine the reimbursement amount. Tyler disagrees with Dunn's conclusion that it does not have to change channel until payment is received. In the *Report and Order* in MM Docket No. 95-175, para 19, the Commission stated that no station need take steps to change frequency until it is assured that it will receive payment. Tyler has assured Dunn that it will make reimbursement. Therefore, Tyler concludes Dunn must change channels now.

Discussion

The Commission established guidelines for determining the reimbursement owed to a licensee ordered to change frequencies in *Circleville*, *supra*. In such cases, the Commission expects the parties to determine expeditiously, mutually and in good faith reasonably and prudently incurred reimbursable expenditures. The Commission will involve itself in such matters *only* as a last resort. See, *e.g.*, *Harold A. Jahnke*, 74 FCC 2d 265 (1979). The Commission in *Circleville*, in establishing the guidelines governing the reimbursement owed by the benefiting party, considers the following items to be reasonable expenses for a channel change: (1) engineering and legal costs; (2) new equipment that is legitimately required for the channel change; (3) the printing of new logs and stationery; (4) out-of-pocket expenses while the station is off the air; and (5) limited advertising for the new frequency (as long as there is not an attempt to improve the station situation at the expense of the reimbursing party). While this list is not all-inclusive, we see no need at this point for further clarification. We continue to believe that most cases can be resolved through the good faith negotiations of the parties.

Having thoroughly reviewed the pleadings before us, we are unwilling to permit protracted delays in instituting new service to the public which would be realized by the operation of KTLS simply because two licensees can not mutually agree upon reasonable and prudent expenses incurred in the channel change. Tyler clearly has represented to the Commission that it will reimburse Dunn to make the channel change. Moreover, under the terms of the *Report and Order* in MM Docket No. 95-175, KIMY must vacate Channel 228A promptly. Dunn is not permitted to delay the channel change and delay institution on new service due to a reimbursement dispute.

Accordingly, **it is Ordered that**, Dunn will have thirty days from the date of this letter in which to commence operations on Channel 230A. **It is further Ordered that**, on the thirtieth day, regardless of whether KIMY has commenced operations on Channel 230A, Tyler may commence program test operations of KTLS with the parameters authorized by its construction permit on Channel 227C1. **It is further Ordered that**, Tyler and Dunn will file within ten days of commencement of program test operations on Channel 227C1 and 230A respectively, an application for license, FCC Form 302-FM. We continue to believe that most cases can be resolved through the good faith negotiations. However, final action on Tyler's application for license will be withheld pending the resolution of the reimbursement matter. We will associate all filings with the anticipated filing of Tyler's license application. Action on the November 6, 1997 request for Special Temporary Authority will be held in abeyance.

Sincerely,



Peter H. Doyle
Assistant Chief
Audio Services Division
Mass Media Bureau

cc: Tyler Broadcasting Corporation
Vera Dunn
Rick C. Parrish & Assoc.
Bromo Communications, Inc.

CERTIFICATE OF SERVICE

I, Angela Y. Powell, a paralegal in the law offices of Smithwick & Belendiuk, P.C., hereby certify that on March 28, 2000, a copy of the foregoing was sent via First Class Mail, postage pre-paid to:

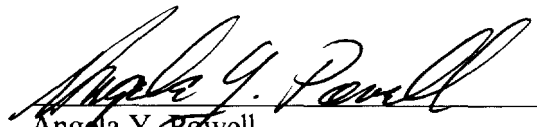
Peter H. Doyle, Esq.**
Assistant Chief
Audio Services Division
Mass Media Bureau
Federal Communications Commission
The Portals II
445 Twelfth Street, S.W.
Room 2-A267
Washington, DC 20554

Mr. Glenn Greisman**
Federal Communications Commission
The Portals II
445 Twelfth Street, S.W.
Room 2-A110
Washington, DC 20554

Southern Broadcasting & Investments
Station WBTY
P.O. Box 577
Homerville, GA 31634

Mr. Albert Leon Brooks
Station WVGA
1707-A Al Brooks Drive
Valdosta, GA 31601

**by hand


Angela Y. Powell